IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-753

JOHN W. HOFFMAN, ET AL.,
Petitioners,
v
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. ——

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, John W. Hoffman, Anton Verbiscus, William R. Fischer, Joe Tibus, Duane Braun, George Carlton and Arthur Novotney, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 26, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The order of the Court of Appeals for the Sixth Circuit referring respondent's Motion to Dismiss Appeal of William R. Fischer to the hearing panel, not reported, appears in the Appendix hereto. The order of the Court of Appeals for the Sixth Circuit dismissing respondent's Cross-Appeal, not reported, appears in the Appendix hereto.. Opinion of July 22, 1975, rendered by the United States District Court for the Eastern District of Michigan denying respondent's Motion to Dismiss action as to all plaintiffs and specifically as to William R. Fischer is reported at 398 F Supp 530 and the Appendix hereto. The United States District Court's Opinion of June 4, 1976, again denying Motion to Dismiss action as to all plaintiffs is not reported and appears in the Appendix hereto. The Opinion of the United States District Court of July 8, 1976, granting defendant's Motion to Dismiss against William R. Fischer is not reported and appears in the Appendix hereto. The United States District Court's Opinion of February 3, 1977, dismissing action is not reported and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 26, 1979. A timely petition for rehearing was denied on August 16, 1979, and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under *28 USC § 1254(1)*.

QUESTIONS PRESENTED

1. Whether the Federal Aviation Administration has discretion under the provisions of *28 USC § 2680(a)* to disregard its own regulations setting forth minimum clear standards for eligibility which must be met by an applicant for an Air Taxi Commercial Operator (ATCO) certificate and to issue an ATCO certificate to an applicant who was not eligible for such certificate and the application submitted by the applicant indicated its ineligibility.

2. Whether the misrepresentation exception under *28 USC § 2680(h)* is applicable to bar petitioners' cause of action against the respondent for failure to comply with its own regulations and wrongfully issuing an ATCO certificate to an ineligible applicant.

3. Whether the effect, if any, of the subsequent or concurring negligence on causation and on the ultimate liability of the respondent should be determined by application of traditional tort rules covering subsequent substantially contributing causes.

4. Whether the administrative claim of William R. Fischer was timely filed under the provisions of *28 USC § 2401(b)*.

5. Whether the Opinion of the Court of Appeals for the Sixth Circuit enlarged the rights of respondent by reversing, in principle, the Opinions of the United States District Court of July 22, 1975 (398 F Supp 530), and June 4, 1976, without benefit of a cross-appeal by respondent.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

(In effect during period involved)

(Provisions involved are lengthy and the citations are indicated below. Text appears in Appendix A.)

14 CFR § *298.1* (Appendix Page A-1); *14 CFR* § *298.41* (Appendix Page A-1); *14 CFR* § *298.42* (Appendix Page A-2).

14 CFR § *135.15* (Appendix Page A-2).

28 CFR § *14.2* (Appendix Page A-3).

49 USC § *1302* (Appendix Page A-3); *49 USC* § *1302(b)* (Appendix Page A-3); *49 USC* § *1371* (Appendix Page A-4).

28 USC § *1346* (Appendix Page A-4).

28 USC § *2401* (Appendix Page A-4, A-5).

28 USC § *2680* (Appendix Page A-5); *28 USC* § *2680(a)* (Appendix Page A-5); *28 USC* § *2680(h)* (Appendix Page A-5).

STATEMENT OF THE CASE

Under date of July 11, 1969, an application for an Air Taxi Commercial Operator (ATCO) certificate was filed with the Federal Aviation Administration (FAA) by John J. Murphy and Lesley E. Krajenki D/B/A American Aviation Company (Pl. Ex. 3, Appendix Page I-54, I-55). The application was on FAA form 8000-6 and this form provided in Part 2C for the applicant to indicate whether the applicant held CAB economic/exemption authority. The application submitted indicated that American Aviation Company did not hold CAB

economic/exemption authority. It has been stipulated by the parties that at all times material to this action, the pilot, John J. Murphy, and American Aviation Company were uncollectible and that a judgment rendered against them could not be recovered. It was further stipulated that American Aviation Company never had any insurance for passenger liability coverage, as required by *14 CFR 298.41* (Appendix A-1), *14 CFR 298.42* (Appendix A-2) and *14 CFR 135.15(b)* (Appendix A-2). The FAA issued its ATCO Certificate No. 5-CE-100 (Pl. Ex. 4) to John J. Murphy and Lesley E. Krajenke D/B/A American Aviation Company on July 15, 1969.

Under date of February 9, 1970, the FAA issued its Notice N 8430.120 (Pl. Ex. 2, Appendix Page J-57) which provides, in part, as follows:

> "1. *Purpose*. This Notice provides guidance with respect to the FAA responsibility for enforcement of the liability insurance, registration and reporting requirement imposed on air taxi operators by the 1 July 1969 amendment and reissuance of the Civil Aeronautics Board Economic Regulations Part 298.
>
> 2. *Background*. Referring to FAR 135.15(b), field personnel have been asking the following questions—
>
> a. Should an FAA ATCO certificate be denied an applicant unless he presents evidence of having complied with:
>
> (1) the registration requirements, and,
>
> (2) the liability insurance requirements of

b. Should enforcement action be initiated against those operators currently certificated and operating who have not complied with the insurance, registration and reporting requirements of Part 298?"

* * *

"4. *Action*

a. Inspectors will advise applicants for an ATCO certificate of the insurance requirements of the CAB, but should not attempt to withhold the issuance of an ATCO certificate until the applicant obtains the required insurance certificate."

* * *

Under date of November 3, 1970, the FAA issued its notice 8430.1A (Def. Ex. 2, Appendix Page K-60) which provides, in part, as follows:

"51. *Eligibility for Certificate (FAR 135.15)*

* * *

b. The holder of an ATCO certificate is prohibited from engaging in air transportation except through exemption authority provided by Civil Aeronautics Board Economic Regulation Part 298. Although enforcement of this regulation is the primary responsibility of the CAB, inspectors shall advise applicants for an ATCO certificate of the liability insurance registration and reporting requirements of Part 298. *Do not withhold the issuance of an ATCO certificate because the applicant does not have the required insurance certificate.*" (Emphasis added)

* * *

Both of these notices are subsequent to the date of the issuance of ATCO certificate issued to American Aviation Company. The parties have stipulated that at the time the ATCO certificate was issued to American Aviation Company the national policy of the FAA was to not withhold issuance of an ATCO certificate until the applicant obtained the required insurance.

On October 28, 1970, the petitioners were passengers for hire aboard the aircraft owned by American Aviation Company and being operated pursuant to the authority granted it by virtue of the ATCO Certificate No. 5-CE-100 (Pl. Ex. 4) issued by the FAA. The aircraft was piloted by John J. Murphy, one of the owners. The aircraft crashed shortly after takeoff. The parties have stipulated that the crash was caused by the negligence of the pilot. All of the petitioners sustained injuries in the crash.

The crash was investigated by the National Transportation Safety Board. A Factual Aircraft Accident Report—General Aviation was prepared by the Board (Pl. Ex. 1). This report contains written statements of all of the petitioners, including William R. Fischer, and indicates that petitioners sustained injuries.

Subsequent to the crash the petitioners learned that American Aviation Company did not have liability insurance for passengers as required by *14 CFR 298.41(a)* (Appendix Page A-1), *14 CFR 298.42(a) (1)* (Appendix Page A-2) or *14 CFR 135.15(b)* (Appendix Page A-2) and that recovery for injuries, loss of earnings, and medical expense was not possible from the pilot, John J. Murphy, or American Aviation Company because they were uncollectible.

All of the petitioners submitted claims pursuant to *28 CFR 14.2(a)* (Appendix Page A-3). These claims were denied and the petitioners brought the instant action in the District Court, Eastern District of Michigan under the *Federal Tort Claims Act 28 USC § 1346(b)* (Appendix Page A-4) and *2671, et seq*. This action was based upon the claim that the respondent failed to exercise due care and was negligent in issuing the ATCO cerfiticate involved in violation of its own regulation, *14 CFR 135.15(b)* (Appendix Page A-2) which required an applicant to hold economic authority required by the civil Aeronautics Board (CAB) This authority is contained in *14 CFR 298.41(a)* (Appendix Page A-1) and *14 CFR 298.42(a) (1)* (Appendix Page A-2) and required an applicant to maintain insurance for bodily injury to or death of aircraft passengers. Petitioners claim that the administration of these regulations was a ministerial or administrative function. The respondent's failure to exercise due care in issuing the ATCO certificate involved without the required insurance has resulted in a loss of property to the petitioners because of their inability to be compensated for the physical injuries sustained, loss of earnings and medical expenses. Petitioners claim that the issuance of the ATCO certificate authorized American Aviation Company to carry petitioners as passengers for hire on the flight and that if the ATCO certificate had not been issued by the FAA, the flight would not have occurred.

The respondent filed a Motion for Summary Judgment of Dismissal as to all petitioners on the theory that the FAA had discretion to disregard its own regulation [*14 CFR 135.15(b)*] (Appendix Page A-2) pursuant to FAA Notice 8430.120 (Pl. Ex. 2, Appendix Page J-57) and that petitioners' claim was barred

under the discretionary exclusion of *28 USC § 2680(a)* (Appendix Page A-5). Respondent also filed at that time a Motion for Summary Judgment of Dismissal as to William R. Fischer on the theory that his administrative claim was not received within the time established by the provisions of *28 USC § 2401(b)* (Appendix Page A-4, A-5). Shortly before the date set for argument on these two motions, the respondent filed its Supplemental Motion in Support of Motion for Summary Judgment. The primary theory of this latter motion was that the misrepresentaton exclusion under the provisions of *28 USC § 2680(h)* (Appendix Page A-5) also barred petitioners' claim.

The District Court denied the Motion for Summary Judgment of Dismissal as to all petitioners ruling that *14 CFR 135.15* (Appendix Page A-2) established clear standards to be applied to fact situations in order to determine basic eligibility. Application of the regulation did not involve a discretionary function. The motion directed to William R. Fischer was denied based on insufficiency of the affidavits attached to the motion. The District Court declined to consider the Supplemental Motion based on the misrepresentation exception because not timely filed prior to argument. Respondent did not reschedule this Supplemental Motion for argument before the District Court, and no ruling was entered by the District Court on the misrepresentation exclusion. The District Court's Opinion dated July 22, 1975, denying the Motions and declining to consider the Supplemental Motion is reported at 398 F Supp 530 and is contained in the Appendix hereto, Page B-6.

The respondent filed a Motion for Reconsideration of the Order Denying the Motion for Summary Judgment of Dismissal as to all petitioners. The theory of this Motion was that the FAA had adopted a deliberate policy of not withholding ATCO certificates based on an applicant's lack of insurance as set out in FAA Notice 8430.120 (Pl. Ex. 2, Appendix Page J-57) and that policy came within the discretionary exclusion provisions of *28 USC § 2680(a)* (Appendix Page A-5). The District Court denied this motion ruling that *14 CFR 135.15* (Appendix Page A-2) was directed to the FAA itself and involved merely the matching of facts against a clear rule or standard, and its application was not a discretionary function. The District Court's Opinion dated June 2, 1976, is not reported but is contained in the Appendix hereto, Page C-31.

Respondent filed a Second Motion for Judgment of Dismissal as to William R. Fischer. The Motion contained a new affidavit on behalf of the FAA indicating a different date of receipt of the administrative claim of William R. Fischer. The District Court granted this motion based upon the affidavit attached, ruling that the claim was not timely received. The District Court's Opinion dated July 8, 1976, is not reported but is contained in the Appendix hereto, Page D-39.

The District Court separated the liability issue from the damage issue and trial of the liability issue only was concluded. The District Court's Opinion dated February 3, 1977, found no cause of action against respondent. The District Court ruled that the sole proximate cause of the crash was pilot negligence and that the FAA's failure to demand proper insurance coverage before issuing the ATCO certificate was not

connected to the cause of the crash. The District Court's Opinion does not address the issue as to proximate cause of petitioners' loss of property resulting from the lack of insurance required by *14 CFR 135.15(b)* (Appendix Page A-2). This Opinion is not reported but is contained in the Appendix, Page E-43.

Petitioners filed Notice of Appeal to the United States Court of Appeals for the Sixth Circuit, and respondent filed its Notice of Cross-Appeal. Subsequently, responent filed its Motion for Voluntary Dismissal of Cross-Appeal. This Motion was granted, and an Order dismissing the Cross-Appeal was entered. (Appendix Page F-49).

During the pendency of the Appeal, the respondent filed a Motion to Dismiss the Appeal of William R. Fischer. An Order was entered referring this Motion to the hearing panel. (Appendix Page G-50).

There has been no ruling by the Court of Appeals on this motion.

The Court of Appeals, in its Opinion of June 26, 1979 (Appendix Page H-51), affirmed the judgment of the District Court by adopting and quoting the District Court's Opinion based on the issue of proximate cause of the crash. The Court of Appeals' Opinion also did not address the issue of proximate cause of petitioners' loss of property resulting from the lack of insurance required by *14 CFR 135.15(b)* (Appendix Page A-2).

The Opinion of the Court of Appeals reversed, in principle, the Opinions of the District Court of July 22, 1975 (Appendix Page B-6), and June 2, 1976 (Appendix Page C-31) which held that the discretionary exclusion contained in *28 USC § 2680(a)* (Appendix Page A-5) was not available to respondent as a defense to petitioners' claim.

The Opinion of the Court of Appeals also ruled, in principle, that the misrepresentation exception contained in *28 USC § 2680(h)* (Appendix Page A-5) would bar petitioners' claim. The District Court had not rendered a decision on this issue.

Petitioners filed a Petition for Rehearing with the Court of Appeals. This Petition was denied on August 16, 1979.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit has rendered a decision, in principle, which:

(a) Decides important questions of federal law which have not been, but should be settled by this court.

(b) Conflicts with decisions of other Courts of Appeal.

(c) Conflicts with decisions of this Court.

(d) Has departed from the accepted and usual course of judicial proceedings, and this Court should exercise its power of supervision.

An issue of first impression is the question whether the FAA had discretion to adopt a policy to disregard its own duly promulgated regulation setting forth basic eligibility standards for an ATCO certificate rather than revoking the regulation under the provisions of *5 USC § 552(a)(1)(c)*. The District Court recognized that there were no prior decisions relating to the authority of an agency to informally revoke its own regulation by a written directive to its field personnel to disregard the regulations. (Appendix Page B-6). In determining this

issue of discretion, the District Court applied the principles set forth in *Dalehite* v *United States*, 346 US 15 (1953). The Court also applied the principles set forth in *Coastwise Packet Co* v *United States*, 398 F2d 77 (1st Cir 1968); *Hendry* v *United States*, 418 F2d 774 (2nd Cir 1969); *Marr* v *United States*, 307 F Supp 930 (E.D. Ok 1969) and *Duncan* v *United States*, 355 F Supp 1167 (D D.C. 1973). These decisions set forth the principle that where a grant of a license or certificate involves nothing more than the matching of facts against a clear rule or standard, the grant will be considered operational and not discretionary. The Ninth Circuit adopted the analysis for determination whether a decision was discretionary or operational contained in *Hendry* v *United States, supra,* in its decision in *United States* v *DeCamp*, 478 F2d 1188, 1191 (9th Cir 1973). This District Court ruled that the policy decision by the FAA to disregard its own regulation [*14 CFR 135.15(b)*] (Appendix Page A-2) was not a discretionary act within the provisions of *28 USC 2680(a)* (Appendix Page A-5).

The Sixth Circuit, in reversing these rulings in principle, relied upon this Court's ruling in *Dalehite* v *United States, supra.* It should be noted that the other court of appeals as well as the District Court in the instant case were interpreting the principles of *Dalehite* v *United States* and reached conflicting decisions with the present decision of the Sixth Circuit.

The decision of the Sixth Circuit ruling that the provisions of *28 USC § 2680(a)* would bar this action also conflicts with the decisions in *United States* v *Wilbur*, 427 F2d 947 (9th Cir 1970), Cert denied, 91 S Ct 250, 400 US 945, 27 L Ed 2d 250; *Borough of Lausdal, Pennsylvania* v *Federal Power Commission*, 494 F2d 1104

(CA D.C. 1974); *Hammond* v *Lanfest*, 398 F2d 705 (2nd Cir 1968), and reverses its own prior decision in *Schatten* v *United States;* 419 F2d 187 (6th Cir 1969). These decisions held that administrative agencies must comply with their own regulation; that a validly promulgated regulation of a federal agency binds the government and this is no less so because the governmental action is essentially discretionary in nature and that administrative procedures and regulations established by Congress or administrative agencies cannot be ignored in deference to administrative procedure.

The regulations of both the CAB and FAA should be considered in context with the Federal Aviation Act of 1958, *49 USC § 1301, et seq.* and the intent of Congress to regulate air transportation, assure safety in and foster sound economic conditions in such transportation. *49 USC § 1302(b)* (Appendix Page A-3). The Civil Aeronautics Board is charged with the duties, including issuance of regulations, to carry out the provisions of the Act. *49 USC § 1324(a).* The FAA is established under the provisions of *49 USC § 1341.* The CAB is authorized to establish classification of air carriers. *49 USC § 1386.*

Congress was concerned with the ability of the public to recover for injuries or loss of property under the Federal Aviation Act of 1958. It provided that no air carrier shall engage in any air transportation unless there is in force a certificate authorizing the carrier to do so. *49 USC § 1371(a)* (Appendix Page A-4). Congress also specifically required that no certificate to engage in supplemental air transportation, and no special operating authorization described in *49 USC § 1387* shall issue or remain in effect, unless the

applicant complies with regulations or orders of the CAB governing policies of insurance for personal injuries, death, damage to or loss of property. *49 USC § 1371(n)(1), 49 USC § 1371(n)(5).*

Congress charged the CAB and the FAA to adopt regulations and orders to protect the rights, welfare and safety of the public. The decision of the Sixth Circuit that the FAA has discretion under the provisions of *28 USC § 2680(a)* (Appendix Page A-5) to disregard their own regulation requiring insurance protection for passengers and to issue an ATCO certificate to an unqualified applicant is in conflict with the provisions of the Federal Aviation Act of 1958, *49 USC § 1371 et seq.* (Appendix Page A-4) and with decisions of other courts of appeal and this Court setting forth principles to be applied in determining whether discretion exists. The decision of the Sixth Circuit, in this respect, renders the provisions of *14 CFR 298 et seq.* (Appendix Page A-1) and *14 CFR 135.15(b)* (Appendix Page A-2) meaningless and would likewise render meaningless any other regulation of all governmental agencies adopted to protect the public interest unless such agencies would voluntarily comply with their own regulations.

The Sixth Circuit also ruled, in principle, that *28 USC 2680(h)* (Appendix Page A-5) would bar petitioners' claim. The Opinion does not indicate the specific exception that would bar the claim, but since the respondent, in its appeal brief and oral argument asserted the misrepresentation exception as a defense, this writer will address that issue on the assumption that the Opinion was directed towards respondent's position. This ruling would establish that the issuance of a certificate to engage in air transportation required

under *49 USC § 1371(a)* (Appendix Page A-4) to known unqualified applicants merely constitutes a misrepresentation to the public that the applicant was qualified and in compliance with all applicable regulations required for the issuance of the certificate and that reliance by the public on that particular certificate in arranging a flight is subject to this defense. The Sixth Circuit relied upon *Dalehite* v *United States, supra,* to support this ruling. The *Dalehite* decision does not consider the misrepresentation exception.

The Sixth Circuit Opinion conflicts with decisions of other circuits and this Court. *Matthews* v *United States of America*, 456 F2d 395 (5th Cir 1972); *Hicks* v *United States of America*, 511 F2d 407 (DC Cir 1975); *Indian Towing Co* v *United States*, 350 US 61, 76 S Ct 122. These cases held that the tortious failure of a United States agency to perform a duty imposed upon it by law or if reliance by the public is engendered by the agency are not subject to the misrepresentation exception. See also *United Air Lines, Inc* v *Wiener*, 335 F2d 379 (9th Cir 1964); *Hartz* v *United States*, 387 F2d 870 (5th Cir 1968). Mandatory insurance requirements are designed to protect innocent victims of a regulated activity. The victim's knowledge of, or reliance upon, the existence of such protection is wholly irrelevant to the statutory purpose and should be irrelevant to the existence of governmental tort liability for errors in licensing.

The District Court and the Sixth Circuit in adopting their rulings regarding proximate cause did not apply traditional tort rules covering subsequent and substantially contributing causes in their determination. The District Court misapprehended plaintiffs' cause of

action by directing its attention away from proximate cause of damage to limit its decision to proximate cause of the crash.

A review of the Opinion of the District Court dated February 2, 1977 (Appendix Page E-43), indicates that the Court stated:

> "Even assuming that the FAA was negligent in issuing an ATCO Certificate without ascertaining that the company had the economic authority required by the CAB (that is, liability insurance of $75,000.00 per passenger), plaintiff still must establish that the improper licensing was a proximate cause of their *damage*.[1]" (Emphasis added)

By reference to the footnote indicated the Court stated:

> ". . . even assuming that Michigan might recognize such a cause of action, however, one is still left to resolve the underlying factual issue of whether the negligent issuance of the certificate or license was a proximate cause of the *crash*." (Emphasis added)

Michigan has ruled that an intentional tort is not in the exercise or discharge of a governmental function within the meaning of the governmental tort liability act. *Lockaby* v *Wayne County*, 406 Mich 65 (1979); *McCann* v *Michigan*, 398 Mich 65 (1976). The instant action involves a deliberate policy to disregard a duly promulgated regulation rather than a single oversight and constitutes an intentional tort.

The District Court ruled that the lack of insurance required before issuing the ATCO certificate was not

connected to the cause of the crash. The District Court did not address the issue that there may be more than one proximate cause of damage or loss of property and, in fact, did not address the issue of proximate cause of petitioners' loss of property by their inability to recover damages. The District Court based its decision upon *Bristow* v *United States*, 309 F2d 465 (6th Circuit 1962); *Gibbs* v *United States*, 251 F Supp 391 (E.D. Tenn 1965) and *Harvey* v *United States*, 14 C.C.H. Avi L Rep 18,048 (E.D. Pa 1976). None of these cases are applicable in the instant proceeding. Both *Bristow* v *United States, supra*, and *Gibbs* v *United States, supra*, involved an airworthy certificate and in each case the trial judge ruled that the aircraft was airworthy, and there was no negligence involved in the issuance of the certificate. In *Harvey* v *United States, supra*, there was no regulation involved, and the court declined to consider the issue of proximate cause because the record was not complete.

Neither the District Court nor the Sixth Circuit determined the issue of proximate cause of petitioners' loss of property resulting from the lack of insurance required before issuance of the ATCO certificate. The only issue of proximate cause determined by the lower courts was the proximate cause of the crash. The crash was foreseeable to respondent, the regulations were adopted to prevent the loss of property and for compensation for injuries to passengers, and petitioners were within the class of persons to be protected by the regulations. The lower courts did not consider the issue that the crash was a foreseeable subsequent occurrence that would not relieve the respondent from liability. The lower courts did not apply the traditional tort rule that if a man does an act and he knows, or by the exercise of reasonable foresight should have known that in the event of a subsequent occurrence, which is not

unlikely to happen, injury may result from his act, and such subsequent occurrence does happen and injury does result, the act committed is negligent and will be deemed to be the proximate cause of injury. *Detroit Edison Co* v *Ewing*, 122 F2d 852 (6th Cir 1941); *Freeman* v *United States*, 509 F2d 626 (6th Cir 1975), *Paparelli* v *General Motors Corp*, 23 Mich App 575 (1970); *Nielsen* v *Henry H. Stevens, Inc*, 368 Mich 216 (1962).

Ross v *Hartman*, 193 F2d 14 (CA D.C. 1943) sets forth the principle that if the injury suffered is the very injury that the statute was intended to prevent, that injury must be considered as directly caused by the non-observance of the law. See also *57 Am Jur 2d § 262, P 649; Brennen* v *City of Eugene*, 591 P2d 719 (1979). The failure of the lower courts to consider and determine the proximate cause of loss of property to petitioners by applying the accepted tort rules in effect in Michigan, where the cause of action arose, constitutes a failure to rule upon petitioners' cause of action for loss of property and merely determines the proximate cause of a foreseeable subsequent occurrence which is not relevant to petitioners' claim except to the extent that it would establish petitioners' right to recovery from the pilot and the company which had been issued the ATCO certificate. This lack of ruling upon petitioners' cause of action constitutes a departure from the usual and accepted course of judicial proceedings, and this Court should exercise its power of supervision. The issue as to whether a wrongful issuance of an ATCO certificate without the required insurance can constitute proximate cause of petitioners' loss of property because of inability to recover their damages also constitutes an important question of federal law which has not been, but should be settled by this Court.

The District Court granted an Order (Appendix Page D-39) dismissing the claim of William R. Fischer for failure to file an administrative claim within the time prescribed by the provision of *28 USC 2401(b)* (Appendix Page A-5). The crash occurred on October 28, 1970. Written statements of the crash were furnished to the National Transportation Board by William R. Fischer on December 8, 1970. The claim was received by the CAB on October 30, 1972, which was a Monday. Conflicting affidavits were filed by the FAA as to its receipt of this claim (Appendix Page B-28, B-29; D-41, D-42). The affidavit of George A. Foster indicates that the FAA received the notice on October 31, 1972. The affidavit of John R. Harrison indicates that the FAA received the notice on November 1, 1972. October 28, 1972, was two years after the crash and fell on a Saturday, and government offices were closed. The provisions of *Rule 6 of the Rules of Civil Procedure* indicate that the day of the event shall not be included in computing the period of time prescribed nor should the last day so computed be included if it is a Saturday, Sunday or legal holiday, but computation should run until the end of the next day. Under this rule, the claim of William R. Fischer was timely filed with the CAB. Claims had been filed with both the CAB and FAA because both agencies were involved in promulgating the regulations involved. The CAB, FAA and National Transportation Safety Board are under the Transportation Department. *49 USC 1655, et seq.* Both the CAB and FAA are directed by Congress to carry out the provisions of The Federal Aviation Act of 1958, *49 USC* § 1301, *et seq.* The FAA has not claimed any prejudice by their receipt of this claim either one or two days late, depending upon which

affidavit of receipt is correct. *28 CFR 14.2(a)* (Appendix Page A-3) provides that if a claim is presented to the wrong agency, that agency shall forthwith transfer it to the appropriate agency.

One of the issues presented is whether timely notice on the CAB, having interrelated functions with the FAA and both agencies under the Department of Transportation, is in compliance with *28 USC 2401(b)* (Appendix Page A-4). Another issue is whether the timely written statement of William R. Fischer to the National Transportation Safety Board is in compliance with *28 CFR 14.2(a)* (Appendix Page A-3) which provides that claims may be presentated on Standard Form 95 or other written notification. No money claim was submitted by Mr. Fisher at this time because damages had not yet been ascertained.

The only reported decision which relates to this issue is *Stork* v *United States*, 278 F Supp 869 (DC CA, 1967) aff 430 F2d 1104 (9th Cir 1970) which held that the United States was not prejudiced by a nine-month delay in service of process because it was aware that twenty-seven other cases arising out of the same incident had been filed.

The Sixth Circuit did not render a decision on respondent's motion to dismiss the claim of William R. Fischer. The issue as to sufficiency of the notice to the CAB as constituting notice to the FAA and the knowledge of the National Transportation Safety Board obtained by investigation of the crash with written statements from all the passengers, including William R. Fischer as being compliance with *28 USC 2401(b)* (Appendix Page A-4) is a matter of first impression for this Court. To bar the claim of William R. Fischer when the FAA itself is in conflict as to date of receipt of the claim, *Rule 6 of the Rules of Civil Procedure* is not

applied to the claim filed with the CAB, without consideration of actual knowledge to the National Transportation Safety Board and with no showing of prejudice to respondent results in a harsh and unjust interpretation of the purposes of notice of claims and is erroneous.

The respondent withdrew its cross-appeal. (Appendix Page F-49). The Sixth Circuit affirmed the District Court judgment based on lack of proximate cause but reversed, in principle, the earlier rulings of the District Court that the respondent did not have discretion to adopt a policy to disregard its own regulation. The District Court did not rule on the misrepresentation exception. Petitioners' appeal was based on the sole issue of proximate cause and misapprehension of the petitioners' claim by the trial judge. Respondent, in its appeal brief and oral argument raised the issue of discretionary exclusion and the misrepresentation exception so successfully that the Sixth Circuit has, in effect, enlarged respondent's rights without benefit of the cross-appeal and has reversed the rulings of the District Court. This is erroneous. *Massachusetts Mutual Life Ins Co* v *Ludwig*, 426 US 479, 96 S Ct 2158 (1976); *Morley Co* v *Maryland Casualty Co*, 300 US 185, 191, 57 S Ct 505 (1937).

The Sixth Circuit and the District Court had to assume jurisdiction to rule on the issue of proximate cause. Petitioners asserted in their reply brief and oral argument that the discretionary exclusion and misrepresentation exception issues were outside the scope of appeal because of lack of cross-appeal. These issues are jurisdictional in nature, and the Sixth Circuit, having assumed jurisdiction, should limit its decision

to the issue on the merits under appeal or, in the alternative, simply rule on the jurisdictional issue. *Bell* v *Hood*, 327 US 678, 66 S Ct 773 (1946); *Brown* v *Strickler*, 442 F2d 1000 (6th Cir 1970). This Court should exercise its power of supervision because of this departure from the usual course of judicial procedure.

The decisions below are interpreting important statutes of the United States which constitute important questions, and the determination of these questions by this Court will settle the points of law and make for uniformity of decisions as to rights of litigants under the Federal Tort Claim Act.

The Federal Tort Claim Act does not define the discretionary exclusion and the misrepresentation exception. The Court should more clearly define where discretion ends than is contained in *Dalehite, supra*, where the Court indicated that it was unnecessary to do so. *Dalehite, supra*, sets forth the principle that where there is room for policy judgment and decision, there is discretion. These principles leave the law in uncertainty. This Court should also set forth the principles distinguishing and defining acts which engender reliance by the public and are actionable and those acts which are merely misrepresentations and are not actionable. This Court should exercise its power of supervision over the departure from accepted judicial procedure in the determination of proximate cause and determination of the scope of appeal and should also determine the sufficiency of the notice of claim of William R. Fischer.

CONCLUSION

For these reasons this Court should consider and determine all of the complex legal issues involved and a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

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October 29, 1979

APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED
(In effect during period involved)

14 CFR 298:

§ 298.1 Applicability of part

"This part establishes a classification of air carriers known as 'air taxi operators,' provides certain exemptions from Title IV of the Federal Aviation Act of 1958, as amended, for such air carriers, and established rules and regulations applicable to their operations. This part applies to operations of air taxi operators in air transportation in all States, Territories and possessions of the United States of America."

§ 298.41 Basic requirements

"(a) Each air taxi operator engaging in air transportation shall maintain in effect liability insurance coverage which complies with the requirements of this subpart and which is evidenced by a currently effective policy of insurance, with an attached standard endorsement, available for inspection by the Board and the public at its principal place of business. Notwithstanding the provisions of § 298.44 (b), (g), (h), and (j), no liability insurance will be deemed to comply with this subpart unless it covers all aircraft which the operator operates in air transportation and all services which the operator performs in air transportation."

§ 298.42 Minimum limits of liability

"(a) The minimum limits of liability coverage maintained by an air taxi operator who carries passengers in air transportation shall be:

(1) *Liability for bodily injury to or death of aircraft passengers*. A limit for any one passenger of at least seventy-five thousand dollars ($75,000), and a limit for each occurrence in any one aircraft of at least an amount equal to the sum produced by multiplying seventy-five thousand dollars ($75,000) by seventy-five percent (75%) of the total number of passenger seats installed in the aircraft.

(2) *Liability for bodily injury to or death of persons (excluding passengers)*. A limit of at least seventy-five thousand dollars ($75,000) for any one person in any one occurrence, and a limit of at least three hundred thousand dollars ($300,00) for each occurrence."

§135.15 Eligibility for certificate and operations specifications

"To be eligible for an ATCO certificate and appropriate operations specifications a person must—

* * *

(b) Hold such economic authority as may be required by the Civil Aeronautics Board; and . . ."

28 CFR 14:

§ 14.2 Administrative claim; when presented

"(a) For purposes of the provisions of section 2672 of Title 28, United States Code, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident. If a claim is presented to the wrong Federal agency, that agency shall transfer it forthwith to the appropriate agency."

United States Code, Title 49:

§ 1302 Consideration of matters in public interest by Board

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

* * *

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers";

§ 1371 Certificate of public convenience and necessity

"(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

United States Code, Title 28:

§ 1346 United States as defendant

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the laws of the place where the act or omission occurred."

§ 2401 Time for commencing action against United States

"(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within

two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

§ 2680 Exceptions

"The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary funcion or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed July 22, 1975)

(John W. Hoffman, Anton Verbiscus, William R. Fischer, Joe Tibus, Duane Braun, George Carlton and Arthur Novotney, Plaintiffs, vs. United States of America, Defendant. Civil Action No. 40141)

This matter is before the court on the motions of the defendant, the United States, for summary judgment. The plaintiffs, John W. Hoffman, Anton Verbiscus, William R. Fischer, Joe Tibus, Duane Braun, George Carlton and Arthur Novotny (sic), brought this suit against the United States under 28 U.S.C. §§ 1346(b) and 2674, the Federal Tort Claims Act. Each was a passenger on a plane owned and operated by American Aviation Company. The plane crashed and the plaintiffs allegedly sustained various injuries.

The American Aviation Company was the holder of an ATCO certificate, issued by the Federal Aviation Administration g)faa) It is this fact which forms the basis of the plaintiffs' claims against the government. They contend that the FAA and the Civil Aeronautics Board (CAB) negligently issued the ATCO certificate because the airline did not hold CAB economic authority as required by a regulation promulgated by the FAA (14 CFR 135.15). There appears to be no dispute about the fact that American Aviation did not hold CAB economic authority because it did not carry the requisite liability insurance mandated by a regulation promulgated by the CAB (14 CFR 298.42(a)(1)).

The government has brought two motions for summary judgment. One is addressed only against the plaintiff William R. Fischer. The government contends that his complaint should be dismissed because of his failure to comply with the two year statute of limitations contained in 28 U.S.C. § 2401(b). The other motion is addressed to all plaintiffs and for that reason the court will turn to it first.

MOTION FOR SUMMARY JUDGMENT AS TO ALL PLAINTIFFS

The government contends that the plaintiffs' complaint fails to state a claim upon which relief can be granted. In its original brief, attached to the motion, the government contended that there was no cause of action under the Federal Tort Claims Act because the plaintiffs' claims fell within one of the exceptions to suit contained in 28 U.S.C. § 2680(a)-(n). Specifically the government pointed to the provisions of § 2680(a).

Shortly before the hearing on this motion, the court received a supplemental brief from the government in which it asserted two additional grounds in support of its motion: (1) a vague reference to the absence of proximate cause; and (2) the exception to suit provision contained in § 2680(h) which involves claims arising from misrepresentation. The court does not believe that the proximate cause issue has been adequately briefed by the government, nor was it timely raised. Certainly the plaintiffs did not have an opportunity to respond to this issue. While the issue of § 2680(h) was briefed by the government, the plaintiffs had no opportunity to prepare a response. The court does not believe that this ground should be considered at this time because it was not timely raised. The plaintiffs should have an opportunity to consider and respond to an issue of this

importance to the litigation. Thus, neither of these grounds is here considered.

28 U.S.C § 2680(a) provides as follows:

> The provisions of this chapter and section 1346(b) of this title shall not apply to — (a) any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The government contends that the actions complained of in this case fall within the discretionary function exception.

One of the regulations promulgated by the FAA is 14 CFR 135.15 which sets forth three requirements for eligibility for an ATCO certificate. In this case the plaintiffs are concerned with the second requirement, found in subsection (b):

> To be eligible for an ATCO cerfiticate and appropriate operations specifications a person *must* —
>
> * * *
>
> (b) hold such economic authority as may be required by the Civil Aeronautics Board . . . (Emphasis added)

One of the regulations promulgated by the CAB is 14 CFR 298.42 which sets forth the minimum limit of

liability required to be carried by an air taxi operator in order to receive CAB approval (hold CAB economic authority). § 298.42(a)(1) requires the operator to carry at least $75,000 of liability insurance per passenger for bodily injury or death.

The American Aviation Company did not comply with § 298.42(a)(1) and this fact was known to the FAA. Nevertheless, the FAA issued an ATCO certificate to American Aviation, notwithstanding the provisions of 14 CFR 135.15(b). Presumably, as the government contends, this was done pursuant to FAA Notice 8430.120 entitled *FAA Enforcement Responsibility of CAB Part 298 Requirement* and was signed by the Director of Flight Standards Service of the FAA. This notice informed FAA field personnel not to deny ATCO certificates to applicants because of their failure to meet the CAB insurance requirements but to refer these violations to the CAB for enforcement. The government has provided the court with no citation of authority which authorized the FAA to disregard its own regulations in this fashion.

The parties have formulated the issues differently. The government contends that enforcement of regulations is a discretionary function and falls within the exception to the Federal Tort Claims Act contained in 28 U.S.C. § 2680(a). It notes that the FAA is charged with promulgating and enforcing safety regulations and the CAB is charged with promulgating and enforcing economic regulations. It argues that there is no allegation concerning safety regulations but only an allegation of the failure to enforce an economic regulation. The government reads the plaintiffs' complaint as arguing that the FAA should have enforced the CAB regulation Part 128 by not issuing an

ATCO certificate. It contends that the "FAA Notice" signed by the second in command of the FAA is a policy decision not to enforce the CAB regulation in this manner but rather to let the CAB enforce its own regulations through court action or administrative proceedings as provided by Subpart H of Part 298. This policy decision is also argued to fall within the exception of §2680(a) Thus the government argues that this is a case involving the enforcement of an economic regulation and falls within the discretionary function exception of § 2680(a), both as to the FAA and as to the CAB.

The plaintiffs agree that the enforcement of regulations is a discretionary function. However, they contend that this is not the question. They contend that once regulations have been promulgated — a discretionary function — the promulgating agency must exercise due care and follow these regulations in their administration — a ministerial or administrative function and not a discretionary function. Thus the plaintiffs argue that the FAA was bound to follow the standard contained in 14 CFR 135.15 and that the failure to do so made it subject to suit and liability under the Tort Claims Act:

> While the government's contention that the Civil Aeronautics Board may be protected by the discretionary activity exclusion of the Tort Claims Act for its failure to enforce Part 298, the Federal Aviation Administration may not make the same claim as it is not charged with failing to enforce Part 298 but is charged with negligence in issuing a license (ATCO certificate) in violation of its own regulation Part 135.15. (Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 4)

While the government sees this as a Part 298 case, the plaintiffs argue that this is a Part 135.15 case. They argue that once the regulation was promulgated, failure to follow it amounts to negligence; an agency cannot decide not to follow part of a regulation other than by amendment, but the FAA knowingly violated their own regulations.

Thus the threshold inquiry must be whether this case is an enforcement case as contended by the government, or whether it is a certification case as contended by the plaintiffs.

The pertinent paragraph of the complaint reads as follows:

> IX
>
> That the defendant through employees of the Federal Aviation Administration and the Civil Aeronautics Board was negligent in issuing ATCO Certificate No. 5-C-100 to American Aviation Company when it knew or in the exercise of reasonable care should have known that the said American Aviation Company had not complied with Part 298, Federal Aviation Regulations or was in compliance with § 401(a), Federal Aviation Act of 1958; in permitting American Aviation Company to operate as an air carrier or air taxi engaged in air transportation or air commerce when it knew or in the exercise of reasonable care should have known that the said American Aviation Company was not the holder of economic authority under the Federal Aviation Act of 1958 or the Federal Aviation Regulations and did not hold a certificate of public convenience and necessity nor was it in

> compliance with the economic regulations of the Federal Aviation Administration [sic] and particularly Part 298 thereof; . . .

Although the complaint makes the same allegations against the CAB and FAA, it is necessary to view the roles of the CAB and the FAA separately.

The CAB is charged with promulgating and enforcing economic regulations. Part 298.42, concerning liability insurance, is one such regulation. However, the CAB does not issue ATCO certificates. Thus, the only viable allegation against the CAB must be with regard to their failure to enforce their regulation. By CAB regulations, this enforcement could have taken place even after American Aviation commenced its operations.[1] It thus appears to be a classic enforcement case where someone under the jurisdiction of the CAB is violating one of its regulations. The plaintiffs appear to agree that such an enforcement case falls within the discretionary function exception to suit contained in § 2680(a). In this regard, see *Pan American World Airways, Inc. v. C.A.B.*, 293 F. 2d 483 (D.C. Cir. 1968) at 495, f.n. 22.

However, with regard to the FAA, the plaintiffs do not really complain that the FAA failed to enforce the CAB's regulation. They complain that the FAA failed to

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[1] In this regard it is interesting to note the provisions of 14 CFR § 298.50. This subpart concerns registration and reregistration of air taxi operators with the CAB. § 298.50(c)(1) explains the information which must be supplied by a carrier filing for initial registration. This information includes the carrier's FAA certificate number, *if any*, and the name given the CAB must be the same as that on the FAA certificate, *if any*. This provision seems to contemplate that, as far as the CAB was concerned, an FAA certificate may have been obtained prior to CAB registration, although not necessarily. It is interesting to compare this to the FAA provision, Part 135.15, which requires CAB registration *prior* to obtaining an FAA certificate.

follow *its own* regulation, Part 135.15 in issuing the ATCO certificate. It is not quite accurate to say that the FAA failed to "enforce" Part 135.15 for this was not a situation where someone under the jurisdiction of the FAA was violating one of its regulations. Rather, the regulation was addressed to the FAA itself and not to carriers. It does not tell carriers what they must or must not do; it tells the FAA that in order for it to issue an ATCO certificate, the applicant must meet certain requirements. The plaintiffs complain that the FAA did not abide by this regulation in issuing the ATCO certificate to American Aviation. Thus the complaint, as it relates to the FAA, does not constitute an enforcement case but, rather, it looks more like a negligent certification case although it is not necessary to pin a label on it. This conclusion, however, does not resolve the issue of whether the claims against the FAA are also barred by § 2680(a).

The basic issue here presented is whether or not the issuance of an ATCO certificate in the circumstances of the case at bar was a discretionary function performed by the FAA and thus within the exception to suit provision contained in § 2680(a). The starting point of any inquiry into the applicability of § 2680(a) is with the Supreme Court case of *Dalehite v. United States*, 346 U.S. 15 (1953). In this case, Ammonium Nitrate fertilizer was being produced and a decision to permit exportation of the fertilizer was made by the United States. Production and distribution were under the control of the government. The fertilizer was shipped from various plants to ports, where it was ultimately placed aboard ships. Explosions ensued, which resulted in a major catastrophe. Suits were filed against the United States under the Federal Tort Claims Act.

The trial court found for the plaintiffs, enumerating as some of the acts of negligence the prescription of bagging temperature, the type of bagging required, the labelling required, the coating of the fertilizer required, and failures of the Coast Guard in regulating the storage and loading of the fertilizer. The Court of Appeals reversed and was affirmed by the Supreme Court. The Supreme Court held that as a matter of law, the facts found by the District Court could not give its jurisdiction under the Act because the claim was based upon the exercise or performance or the failure to perform a discretionary function or duty on the part of a federal agency or an employee of the government. The Court went on to hold that the acts of negligence found by the District Court did not subject the government to liability because the decisions about the fertilizer processing and shipping were all responsibly made in the exercise of judgment at a planning rather than an operational level. In so holding, the Court made the following pertinent statements:

> It will be noted from the form of the section, see p. 18, *supra*, that there are two phrases describing the excepted acts of government employees. The first deals with acts or omissions of government employees, exercising due care in carrying out statutes or regulations whether valid or not. It bars tests by tort action of the legality of statutes and regulations. The second is applicable in this case. It excepts acts of discretion in the performance of governmental functions or duty, "whether or not the discrtion be abused." Not only agencies of government are covered but all employees exercising discretion. (346 U.S. at 33)

* * *

> The "discretion" protected by the section is not that of the judge — a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law. (346 U.S. at 34)

* * *

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. (346 U.S. at 35-36)

Before turning to subsequent cases which have attempted to apply the principles of *Dalehite*, it is important to keep the situation at bar clearly in mind. First of all, there is a regulation. 14 C.F.R. 135.15 was promulgated by the FAA and it sets forth the minimum requirements which must be met by an applicant for an ATCO Certificate. There is no question but that the promulgation of this regulation was a discretionary function and a party may not attack its validity through a tort action. However, the question here is whether it was a discretionary function to choose to ignore the regulation. In other words, while there may be a certain

amount of discretion involved in certification, is there discretion in determining the initial question of eligibility for certification?

A complication in the case at bar is the "FAA Notice" which, in effect, instructed FAA field personnel to ignore the provisions of § 135.15(b). This fact raises additional questions: (1) Was there authority to "amend" a duly promulgated regulation in this manner? (2) Whether or not there was such authority, does the fact that the "FAA Notice" was promulgated alter the applicability or nonapplicability of § 2680(a)?

The parties have not cited, and the court has been unable to find, any case which involved the precise issue before the court. In particular, the court has not found a case in which a federal agency granted a certificate or license to a party who was not eligible for such certificate or license according to the plain terms of the pertinent statute or regulation. However, there are cases which lnd a certain amount of guidance to the court.

In *Magellson v. Federal Deposit Insurance Corp.*, 341 F. Supp. 1031 (D. Mon. 1972), cited by the government, the plaintiff brought a tort action against the FDIC complaining of the actions taken with regard to his application for FDIC insurance. The court held that each of the actions complained of fell within the discretionary function exception of § 2680(a). These actions included the decision as to whether the application should be granted and the failure to act on the application. A third allegation was that the Regional Director aroused resentment against the plaintiff and discriminated against him in applying the

rules and regulations of the FDIC. With respect to this allegation, the court stated at 1035-1036:

> Application of the F.D.I.C. regulations is a discretionary, regulatory function of the Regional Director and is committed to him by the rules and regulations of F.D.I.C. It is the Regional Director's duty under 12 C.F.R. § 303.10 to make recommendations to the Board of Directors for use in considering applications of proposed banks for deposit insurance. It follows that the Regional Director must make inquiries concerning the bank upon which to base this report. Whether he abused his discretion in making such inquiries is immaterial since he was using his discretion in relation to matters under his supervision and control.

The FDIC regulations in question advised the Regional Director of what factors he should consider in determining whether to grant an application. Unlike the regulations involved in the case at bar, the FDIC regulation quoted in the opinion did not state that certain of these factors were conclusive as to the eligibility or noneligibility of an applicant. In this regard it is worth noting what the court said with respect to the plaintiff's allegation that he was denied a fair and impartial hearing:

> When a hearing is permissible, Chapter II, Part 308, 12 C.F.R., sets forth procedures to be followed. Plaintiff does not state that these regulations were not followed or that he sought and was refused a hearing. (341 F. Supp. at 1036)

The question thus left unanswered is whether or not the court would have found that an allegation that the regulations were not followed would also have fallen within the discretionary function exception. It is this latter question which is more clearly analogous to the situation in the case at bar.

In *Marr v. United States*, 307 F. Supp. 930 (E.D. Ok. 1969), the plaintiff brought a tort action against the CAB for negligence. She complained that the CAB had negligently issued a certificate of convenience and necessity to an air transportation carrier and a pilot's license to a particular pilot, neither of whom met the requirements for such certificate or license. The government contended that the actions complained of fell within the discretionary function exception. Initially the court refused to dismiss the complaint on this ground and ordered the plaintiff to file additional information:

> The establishment of requirements for pilots and aircrafts and of methods for determining whether those requirements have been met, and the providing of landing systems and communication and weather information facilities, are discretionary functions of government. *But the carrying out of those requirements and methods in some instances may not be discretionary*, and it is in this respect that the plaintiff claims the government was negligent and liable. (Emphasis added) (307 F. Supp. at 931)

In order for the court to determine whether the acts complained of were operational, as opposed to discretionary, functions, the plaintiff was ordered to

supply additional information. After the plaintiff amended her complaint, the court dismissed the case:

> In this case, as set out in both the original complaint and the amended complaint, the acts of negligence alleged are failures of the Civil Aeronautics Board to require adequate inspection tests for air-craft, adequate medical examination standards for pilots, adequate weather information facilities and personnel, and adequate landing system controls at a place where a charter flight was permitted to land. All of these, if true, involve discretionary functions of government and alleging dereliction at the operational level does not convert the action into one that is permitted against the United States. (307 F. Supp. at 932)

The allegations of negligence outlined in the above quotation do appear to fall within the discretionary function exception since they all relate to the planning level of government — the promulgation of standards. However, as outlined earlier in the *Marr* opinion, the original complaint also alleged that the CAB had chartered and then failed to suspend the airline "after notice of previous carelessness in providing insurance for injury or death of members of the aircraft crew . . ." (307 F. Supp. at 931) No mention of this allegation was made when the court dismissed the action. The reason for this is not apparent. However, it is important to note that the court did state that the carrying out of promulgated requirements may not be discretionary functions in all circumstances.

The government has also cited the court to the cases of *Hooper v. United States*, 331 F. Supp. 1056 (D. Conn.

1971) and *Coastwise Packet Company v. United States*, 398 F. 2d 77 (1st Cir. 1968) cert denied 89 S. Ct. 300. However, neither of these cases lends particular support to the government's position.

In the *Hooper* case, the plaintiffs sought damages incurred as a result of the construction of a power generating station in an area where they had previously moored their boats. The court held that the granting of a permit by the Army Corps of Engineers was discretionary. No further explanation was given and it is thus impossible to determine whether this case is applicable to the case at bar.

In the *Coastwise Packet* case, the plaintiff brought suit against the Coast Guard for the delay in granting it a certificate of inspection. Plaintiff alleged that the standards imposed were unreasonably severe, were not developed rapidly enough and were negligently applied. The court found that the alleged actions fell within the discretionary function exception. However, it is very important to note what the court said in so holding:

> Plaintiff's is not a case where there was a single, known, objective standard which, because of administrative negligence, the Coast Guard failed to apply. In such an area there might be questions. When no standard exists, then the process of certifying, insofar as it involves groping for a standard, is within the discretionary exemption of the Act. (398 F. 2d at 79)

* * *

> This is not a case where plaintiff's property suffered damage from the negligent performance of an act the Coast Guard had undertaken after policy had been established . . . (398 F. 2d at 80)

Thus the court seems to be making a distinction between various types of certification cases, only some of which fall within the discretionary function exception. This distinction is more forcibly drawn in the case of *Hendry v. United States*, 418 F. 2d 774 (2nd Cir. 1969).

In the *Hendry* case the plaintiff filed suit against the United States Coast Guard for the negligent withholding of his license based on a negligent psychological determination that he was unfit for sea duty. The district court, after trial, dismissed the case for lack of subject matter jurisdiction and, alternately, gave judgment to the government on the merits. While the Second Circuit agreed with the determination on the merits, it disagreed with the conclusion that the acts complained of fell within the discretionary function exception. While the facts of the *Hendry* case are not analogous to the case at bar, the analysis of the court is quite pertinent. After reviewing prior cases dealing with licensing vis a vis the discretionary function exception, the court stated:

> No very clear rule emerges from either the licensing or the malpractice cases. It seems clear that where the grant of a license depends upon the balancing of several factors and the grant or

> refusal to grant is made without reliance upon any readily ascertainable rule or standard, the courts will hold the judgment to be discretionary. On the other hand, the *Pennsylvania Railroad* case, *supra*, [124 F. Supp. 52 (D. N.J. 1954)] seems correctly to indicate that where the grant involves nothing more than the matching of facts against a clear rule or standard, the grant will be considered operational and not discretionary. Thus a hypothetical statute requiring that an employment certificate issue to all applicants of more than a given age, height, and weight would not empower an official to make a discretionary judgment under Section 2680(a). (418 F.2d at 782)

While the court stated that it did not intend to propose a "litmus paper test" to be applied in cases involving the discretionary function exception, it did note that several factors were pertinent. One of these factors was whether the complaint attacked the nature of rules promulgated or whether it attacked the way in which the rules were applied. After reviewing the *Dalehite* decision, the court stated that *Dalehite*

> . . . appears to privilege from suit those decisions which either establish a rule for future governmental behavior or constitute an *ad hoc* determination which neither applies an existing rule nor establishes one for future cases. By contrast *Dalehite* seems to subject to suit those decisions which apply an existing rule to the facts of a case. To be sure, the application of existing rules in new contexts sometimes involves policy decisions by administrative

> officials akin to those made by legislators. Nevertheless, it can usually be determined whether the governing statute or regulation contemplates that an official will make new rules or *ad hoc* decisions on the one hand or apply old understood rules on the other. (418 F. 2d at 783)

Another factor thought to be pertinent was whether the decision-maker necessarily looked to considerations of public policy. In the *Hendry* case, the court found that the governing statutes and regulations did not appear to convey discretion to identify and consider public safety goals.

Another case which followed the same reasoning as that applied in the *Hendry* case was *Duncan v. United States*, 355 F. Supp. 1167 (D. D.C. 1973). In that case the plaintiff filed a tort suit against the government for the FAA's allegedly negligent withholding of his airman medical certificate. The government filed a motion to dismiss, contending that the actions complained of fell within the discretionary function exception. The plaintiff was not contesting the power of the Administrator to make rules concerning certification; he alleged negligence in the application of these rules.

14 CFR Part 67 set forth the medical standards for certification. Part 67.11 states that any applicant "who meets the medical standards prescribed in this part, based on medical examination and evaluation of his history and condition, is entitled to an appropriate medical certificate." The court stated that "(i)t seems clear, therefore, that any applicant meeting the standards as set forth by the Administrator has a legal right to the certificate." (355 F. Supp. at 1167)

The court found that the situation fell within those cases where clear standards are matched to actual facts where application is found to be operational and not discretionary. "Since an applicant is entitled to a certificate if he qualifies under the regulations (14 CFR 67.11), application of that policy to the individual case is an administrative decision at the operational level which if negligently done will make the government liable." (355 F. Supp. at 1170)

The court has also reviewed the cases cited by the government which pertain to the granting of grazing permits: *Chournos v. United States*, 193 F. 2d 321 (10th Cir. 1951); *Powell v. United States*, 233 F. 2d 851 (10th Cir. 1956); *Kunzler v. United States*, 208 F. Supp. 79 (D. Utah 1961); and *United States v. Morrell*, 331 F. 2d 498 (10th Cir. 1964). The government cited these cases for the proposition that the granting or denial of permits or licenses is a discretionary function. Indeed, these cases do so hold — at least as to grazing permits. To the extent that these cases may be read to stand for the broad proposition that the granting of *all* permits, in *all* situations and under *all* regulations fall within the discretionary exception, the court prefers the reasoning of the *Hendry* and *Duncan* cases, *supra*.

While the court believes that the granting or denial of a license or certificate usually entails some amount of discretion, this is not necessarily so in all cases, particularly with regard to an initial determination of eligibility. The regulation involved here, 14 CFR 135.15, presents clear standards to be applied to fact situations in order to determine basic eligibility. Application of this regulation is done after the planning, or discretionary, stage — at the operational level. A claim of negligence in the application of this regulation

does not involve a discretionary function. In fact, the very terms of the regulation connote a lack of discretion: "To be eligible for an ATCO certificate . . . a person *must*" [emphasis added] meet a readily ascertainable standard; he must hold CAB economic authority. Negligence in the application of this regulation would render the government liable. While the cited cases generally involve a refusal to grant a license, the same principles apply to an allegedly wrongful decision to grant the license.

However, the court must still look to the effect of the "FAA Notice" since Part 135.15 does not stand alone in this case. The government has not cited any provision whereby the FAA was empowered to alter the standards contained in a regulation through the informal procedure here employed. While the court recognizes the government's argument that the formulation of this notice was a policy decision — a discretionary act — the court does not believe that this alters the conclusion that § 2680(a) does not apply.

When the FAA promulgated the "FAA Notice," it was formulating a policy. In short, the policy was to disregard a former policy decision embodied in a duly promulgated regulation. Admittedly, the formulation of policy falls within the discretionary function exception. Thus, if one were to characterize the plaintiffs' complaint as one attacking a policy, the suit would be barred. However, one can just as easily characterize the complaint as one complaining of the refusal to apply a regulation. It is this latter characterization which the court believes to be a proper one.

The result would be different if the regulation was not as specific and thus gave the FAA discretion in its

application. But the court does not read the regulation in this manner. The result would also be different if the government could point to some authority which gave the FAA the power to change the policy by a method other than the formal amendment of the regulation. But without such citation of authority, the court believes that the regulation did not give the FAA the "discretion" to informally amend the regulation.

In sum, if the "FAA Notice" stood alone, the court would find that the present suit was barred. As stated earlier in this opinion, if the regulation stood alone, § 2680(a) would not apply. Looking at the two together, and absent some showing of authority as to the "Notice," the court must conclude that since they are inconsistent, the regulation must prevail.[2]

The government's motion for summary judgment as to all plaintiffs is denied without prejudice.

MOTION FOR SUMMARY JUDGMENT AS TO WILLIAM R. FISCHER

The government has brought a motion for summary judgment against the plaintiff, William R. Fischer, on the grounds that Fischer did not file administrative claims with the FAA and CAB within the two year period specified by 28 U.S. § 2401(b).

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[2] The result here is somewhat ironical since, in effect, if the plaintiffs prevail it would amount to the same as a tort action attacking the policy of the "FAA Notice," giving rise to damages. However, unless and until the government can demonstrate that the "FAA Notice" could effectively alter the regulation, the court must, in effect, ignore the Notice. The circle must be broken at some point. The fact that it was written and signed, rather than being an oral directive, should make no difference absent the requisite showing.

28 USC § 2401(b) provides as follows:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2675(a) expands on this provision and provides that no tort action can be commenced against the United States unless a claim has first been presented to the appropriate Federal agency and the claim has been denied. The accident in this case occurred on October 28, 1970. Thus, in order to comply with 28 U.S.C. 1401(b), the claim must have been presented to the agencies by October 28, 1972.

28 C.F.R. § 14.2 defines what is meant by a claim being "presented":

> (a) For purposes of the provisions of section 2672 of Title 28, United States Code, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, . . . an executed Standard Form 95 or other written notification of an incident . . .

In *Commercial Underwriters v. Dobbs*, #39019 (E.D. Mich. decided May 8, 1973), Judge Gubow of this court held that the mailing of a claim within the statutory period was not sufficient. In that case the accident occurred on September 24, 1969 and the statutory period ran until September 24, 1971. The plaintiff

mailed his claim on September 12, 1971 but it was not received by the agency until October 21, 1971. The court held that the claim was barred since it was not received until after the statutory period had run. Thus, unless the FAA and CAB received the Fisher [sic] claim by October 28, 1972, the action would be barred. The plaintiff argues that once the claim was mailed, it was irrevocably placed in the government's hands and that there are all sorts of problems involved in relying on someone to stamp a claim in or determine when it reached someone's desk. While the court would agree with this statement, the fact remains that the regulation requires receipt, not mere mailing.

The government has supplied two affidavits in support of its motion. It claims that these affidavits established the fact that the Fischer claim was not received by the FAA and CAB until after October 28, 1972.

The affidavit of George H. Foster, the Acting Assistant Chief Counsel of the FAA, states that "the administrative claim filed by and on behalf of plaintiff, William R. Fischer, was received by the Federal Aviation Administration on October 31, 1972." The affidavit of Robert L. Toomey, Assistant Chief of the Litigation and Research Division of the CAB, states that "(t)he administrative claim filed by William R. Fischer, one of the plaintiffs herein, was received at the Board's mail room on October 30, 1972."

The plaintiff Fischer has countered these affidavits with an affidavit of his attorney which states that the claims were mailed on October 27, 1972. Attached to the affidavit is a copy of the receipts for certified mail which indicate that the mailing took place on October 27, 1972. The plaintiff argues that the claims

should have reached the agencies on the following day, October 28, 1972 which was the last day of the two year period. He points out that October 28 was a Saturday and contends that the government's affidavits are insufficient to establish that the claims were not actually delivered on the 28th.

The plaintiff also argues that by closing its offices on Saturday and Sunday, the government unilaterally shortened the statute of limitations period since a claim could not be "received," as defined by the government, on those days. Although this contention need not be resolved at this time, the court would also note that it is general knowledge that government offices are not open on these days and a claimant should keep this fact in mind.

This issue, and other potential issues involving the delivery of mail on Saturday, need not now be decided because the court agrees that the government's affidavits are insufficient. Although, as noted earlier with respect to the motion for summary judgment as to the whole case, there does not appear to be a cognizable claim against the CAB, the court will, nonetheless, discuss the CAB affidavit as well as that of the FAA.

The defects of the two affidavits are apparent. The FAA affidavit states, in conclusory terms, that the claim was not received until October 31. The CAB affidavit, also in conclusory terms, states only that the claim was received in the mail room on October 30. The argument of the plaintiff best sums up the insufficiency of these affidavits:

> Neither Mr. Toomey or Mr. Foster indicated that they would be the persons who would receive

the mail from the Postal Service, the procedure for distribution of mail delivery within their respective agency or an explanation or definition of their use of the word "received" in their affidavits. Mr. Toomey indicates the claim was received in the mail room on October 30, 1972. He does not indicate the source of his knowledge of this fact and presumably would not perform any services in the mail room as Assistant Chief, Litigation and Research Division, office of the General Counsel. Mr. Foster does not indicate the place of delivery within the Federal Aviation Administration nor that he would be the first person to observe delivery of the claim.

Furthermore, although the agency offices may have been closed, the claims may have been delivered to the offices but not stamped or opened. In short, there are too many possibilities which remain unexplained. Thus the court cannot say that the claim was not presented to the agencies within the statutory period.

The government's motion for summary judgment as to William R. Fischer is denied. An appropriate order shall be submitted.

/s/ Ralph M. Freeman
United States District Judge

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MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed June 4, 1976)

(John W. Hoffman, Anton Verbiscus, William R. Fischer, Joe Tibus, Duane Braun, George Carlton and Arthur Novotney, Plaintiffs, v. United States of America, Defendant. Civil Action #40141)

This matter is before the court on the motion of the defendant, the United States, for reconsideration of the prior order of the court denying defendant's motion for summary judgment. Urging the importance of several arguments not previously presented to the court, as well as the reconsideration of arguments fully discussed in the prior opinion, defendant seeks to establish that plaintiffs have failed to state a claim for which relief can be granted under 28 USC §§ 1346(b) and 2674, the Federal Tort Claims Act.

The facts of this case are uncontested. Plaintiffs were passengers on a plane owned and operated by American Aviation Company. The plane crashed, and plaintiffs allegedly sustained various injuries. American Aviation held an ATCO certificate issued by the Federal Aviation Administration; under FAA regulation 14 C.F.R. § 135.9 such certificate must be obtained before a company may operate an air taxi service. The gravamen of plaintiffs' complaint is that the certificate was issued without due care and in violation of a specific FAA regulation, 14 C.F.R. § 135.15(b), which requires a carrier to "[h]old such economic authority as may be required by the Civil Aeronautics Board." The CAB

regulations governing air taxi operations demand that a carrier be covered at all times by liability insurance. 14 C.F.R. §§ 298.3, 298.41, 298.42. Since American Aviation did not have liability insurance, plaintiffs argue that they were not qualified to receive an ATCO certificate pursuant to 14 C.F.R. § 135.15.

Plaintiffs do not suggest that the FAA was negligent merely in the single instance of American Aviation. Rather, all parties concede that at all times pertinent to this case the FAA had a deliberate policy of not withholding ATCO certificates based on an applicant's lack of insurance. This policy was set out explicitly in FAA Notice 8430.120, issued by the Director of Flight Standards Service. The government contends that the FAA had discretion to leave the enforcement of the insurance requirement to the CAB and that therefore the government is immunized from suit by the discretionary function exception of the Federal Tort Claims Act. In its lengthy prior opinion denying summary judgment, this court rejected the government's contention and characterized the case as involving the nondiscretionary failure of the FAA to enforce *its own* regulation.

In support of the motion for reconsideration, defendant first contends that regulation 135.15 is addressed to the certificate applicant rather than the FAA. Defendant's textual analysis relies on the use of the word "person": "To be eligible for an ATCO certificate and appropirate [sic] operations specifications a *person* must —" (emphasis supplied). If the regulation is thus addressed to the applicant rather than the FAA, defendant contends that the FAA has discretion to formulate a procedure for determining whether the

applicant was insured and could leave this responsibility solely with the applicant.

The court is persuaded, however, that regulation 135.15 is addressed to the FAA itself and not merely to the applicant. Subpart A, of which section 135.15 is a part, is entitled "General," as distinguished from Subpart B, which specifically establishes "Rules Governing Persons Holding ATCO Certificates." In contrast to other more specifically denominated subparts, sections under Subpart A appear to be addressed to all concerned parties, including both the FAA and the applicant. This reading is supported by subsection (c) of section 135.15, which directs that an applicant must "[s]how to the satisfaction of the Administrator, that he is able to conduct each kind of operation for which he seeks authorization in compliance with applicable regulations." Thus the regulation clearly contemplates FAA responsibility for ascertaining that an applicant meets the certification requirements. While the FAA undoubtedly does have discretion to formulate procedures for determining whether an applicant is properly insured, this does not equate, as the government would have us believe, with ignoring the insurance requirement altogether. As was fully discussed in the prior opinion in this case, the grant of authority to the FAA involves the "matching of facts against a clear rule or standard," an operational non-discretionary function under the holdings of *Hendry v United States*, 418 F2d 774 (2d Cir. 1969) and *Duncan v United States*, 355 F.Supp. 1167 (D.D.C. 1973). It was therefore the obligation of the FAA to determine that an applicant held such economic authority as was required by the CAB before issuing an ATCO certificate.

Defendant also contends that Notice 8430.120, authorizing the issuance of certificates without proof of insurance, was not inconsistent with the applicable regulations. First, the government claims that the Notice was merely clarifying an ambiguity in the regulation concerning the responsibility of FAA field inspectors; the inspectors were allegedly uncertain whether or not to deny certificates when applicants failed to demonstrate proof of insurance. Such ambiguity only exists, however, if regulation 135.15 is addressed to certificate applicants and not to the FAA. Once it is established that the regulation is directed to the FAA, no choice exists but to deny the certificate until the applicant demonstrates proof of insurance.

While defendant further suggests that the Director of Flight Standards Service had authority to alter the regulation even if it was not ambiguous, the court rests with its original decision on this issue; the regulation required only the matching of facts against a clear rule or standard and was therefore operational and nondiscretionary. The Director of Flight Standards Service had numerous options for establishing a procedure to determine proof of insurance, but to ignore the requirement altogether was not one such option.

Defendant finally urges that the Notice was not inconsistent with regulation 135.15 because under 14 C.F.R. § 298.50 the CAB does not require proof of insurance prior to issuance of a certificate. Under 14 C.F.R. § 298 the CAB has established the economic regulations applicable to air taxi operations; these regulations, taken as a whole, consitute "economic authority" (an undefined term in section 298, but one

specifically referred to in FAA regulation 135.15(b)). The government focuses on section 298.50(b)[1], which states:

> Any person . . . who commences operation under this part after July 1, 1969, shall, within 30 days after commencing such operations, register with the Board . . . .

Since the CAB allows a thirty-day grace period following the commencement of operations before registration, at which time an operator must show proof of insurance, defendant suggests that the "economic authority . . . required by the CAB" at the time of certification does not include proof of insurance. This interpretation is further buttressed by section 298.50(c)(1)[2], which states that a registration form shall include "(i) Name in which the FAA certificate is issued; (ii) the carrier's Federal Aviation Administration certificate number and the name in which the insurance policy is issued . . . ." The government argues that this language clearly contemplates the issuance of a certificate before registration, that is, before a carrier is required to demonstrate proof of insurance. If one accepts this interpretation, the FAA was perfectly correct in issuing certificates without requiring proof of

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[1] Section 298.50 was amended in 1973. The amended version requires that an air taxi operator register and tender proof of insurance thirty days *prior* to commencement of operations.

[2] Section 298.50(c)(1) was also recently amended, and the court's original opinion denying summary judgment referred in a footnote to the amended version. Neither that version nor the regulation in effect at the time of the FAA Notice suggests that liability insurance was not an element of the economic authority required by the CAB prior to FAA certification.

insurance, because the CAB does not require such proof until thirty days following the commencement of operations. In fact, the FAA wold be liable in damages for improper denial of a certificate under section 135.13(b) if it failed to issue a certificate to an uninsured carrier in this situation.

The concept of economic authority required by 14 C.F.R. § 298, however, is not so narrow as the government suggests. Section 298.3 states:

> (a) There is hereby established a classification of air carriers, designated "air taxi operators" which . . . .
>
> (2) Do not hold a certificate of public convenience and necessity or other economic authority issued by the Board;
>
> (3) Have and maintain in effect liability insurance coverage in compliance with the requirements set forth in Subpart D of this part and have and maintain a current certificate of insurance evidencing such coverage on file at the Board; . . . .
>
> (b) A person who does not observe the conditions set forth in paragraph (a) of this section shall not be an air taxi operator within the meaning of this part with respect to any operations conducted by him while such conditions are not being observed, and during such periods is not entitled to any of the exemptions set forth in this part.

Thus the initial classification suggests that the sine qua non of economic authority as an air taxi operator is the holding of liability insurance. Prior to its amendment in

1973, section 298.3 did not even mention the filing of form 298-A (the registration required by § 298.50) as part of the classification and economic authority of air taxi operators.

The emphasis on liability insurance continues with section 298.41:

> (a) Each air taxi operator engaging in air transportation shall maintain in effect liability insurance coverage which complies with the requirements of this subpart and which is evidenced by a currently effective policy of insurance, with an attached standard endorsement, available for inspection by the Board and the public at its principal place of business. *No air taxi operator shall operate in air transportation or perform services in air transportation unless it maintains liability coverage which complies with this subpart.* (Emphasis supplied)

Finally, section 298.42 establishes the minimum limits of liability insurance at $75,000 per passenger.

Liability insurance carried by the operator is a central concern of section 298. While the section does consider the scope of service authorized, size limitations and reporting requirements, the elaborate specifications regarding liability insurance are a key factor in establishing economic authority. Section 298.41 explicitly prohibits air taxi operation without such insurance. The government's argument that liability insurance is not part of the economic authority required by the CAB prior to certification simply does not square with the text of the regulations.

The court is therefore not persuaded that its original decision to deny defendant's motion for summary judgment in this matter was incorrect. FAA regulation 135.15 appears to be addressed to the FAA itself as well as the applicant. Since the regulation involved merely the matching of facts against a clear rule or standard, its application was not a discretionary function. To the extent that the Director of Flight Standards Service chose to issue ATCO certificates when an applicant lacked CAB economic authority, the FAA was in violation of its own regulations and therefore liable under the Federal Tort Claims Act. Moreover, section 298 of the CAB regulations clearly establishes that liability insurance is a requirement of CAB economic authority; the thirty-day grace period allowed for registration does not compromise the liability insurance requirement. The FAA Notice authorizing the issuance of ATCO certificates when an applicant lacked liability insurance, and therefore did not hold the economic authority required by the CAB, cannot be construed consistently with the pertinent FAA regulation. Defendant's motion for summary judgment is therefore, for the second time, denied.

An appropriate order shall be submitted.

/s/ Ralph M. Freeman
United States District Judge

Dated: June 2nd, 1976.

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed July 8, 1976)

(John W. Hoffman, Anton Verbiscus, William R. Fischer, Joe Tibus, Duane Braun, George Carlton and Arthur Novotney, Plaintiffs, vs. United States of America, Defendant. Civil Action No. 40141)

This is a motion for summary judgment in favor of the defendant, United States, and against plaintiff William R. Fischer. The facts are presented in the Court's memorandum opinion at 398 F. Supp. 530 (E.D. Mich. 1975).

The government has brought this motion on the grounds that plaintiff Fischer did not file his administrative claim with the FAA within the two-year statute of limitations specified by 28 U.S.C. § 2401(b). That section provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail (of notice of final denial of the claim by the agency to which it was presented).

28 U.S.C. § 2576(a) expands on this provision and provides that no tort action can be commenced against the United States unless a claim has first been presented to the appropriate Federal agency and the

Claim has been denied. The accident in this case occurred on October 28, 1970. Thus, in order to comply with 28 U.S.C. § 2401(b), the claim must have been presented to the agencies by October 28, 1972.

29 C.F.R. § 14.2 defines what is meant by a claim being "presented":

> (a) For purposes of the provisions of sections 2672 of Title 28, United States Code, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, . . . an executed Standard Form 95 or other written notification of an incident . . .

A similar motion regarding the same plaintiff was heard in June, 1975, and denied the following month. At that time the Court was not satisfied that the affidavits presented by the government were sufficient to support the dismissal of Fischer. The only statement which reported when plaintiff's claim was received by the FAA was the affidavit of George H. Foster, the Acting Assistant Chief Counsel of the FAA who conclusorily stated that "The administrative claim filed by and on behalf of plaintiff William R. Fischer, was received by the Federal Aviation Administration on October 31, 1972." The Court agreed with plaintiff that this affidavit was not sufficient to support the motion for summary judgment because Mr. Foster had neither indicated that he would be the person who received mail from the Postal Service, nor described the procedure for distribution of mail delivery within the FAA, nor explained what was meant by the word "received." The Court also speculated that although the agency offices were closed on October 28, 1972, the last day of the limitation period, the claims might have been delivered to the offices but not stamped or opened

— and this possibility was not rebutted by Mr. Foster's affidavit. Given the many possibilities that remained unexplained last June, the Court declined to grant summary judgment.

The affidavits which accompany the government's new motion appear to cure the former insufficiency. The affidavit of Mr. Robert Byrd of the United States Postal Service, who was on duty at the Registry Section of the City Post Office, Washington, D.C., on October 31, 1972, states that certified letter No. 211835 (which bore Mr. Fischer's complaint) was dispatched to the FAA at 2:25 A.M., October 31, 1972. Attached to Mr. Byrd's affidavit is a copy of Post Office Form 3854, used to log certified letters, which supports Mr. Byrd's statement that plaintiff's complaint, certified letter No. 211835, was logged and dispatched from the Washington D. C. Post Office at 2:25 A.M., October 31, 1972. The logical inference which must be drawn from Mr. Byrd's affidavit is that the FAA could not possibly have received Mr. Fischer's complaint prior to October 31, 1972, the day upon which it was dispatched from the post office.

The affidavit of John R. Harrison, Assistant Chief Counsel, Litigation Division, Office of the Chief Counsel, Federal Aviation Administration, stated that the administrative claim filed by plaintiff William Fischer was contained in certified letter No. 211835, and that such claim was received in Mr. Harrison's office on November 1, 1972. Mr. Harrison also testified that he is the person responsible for the disposition of all claims filed with the FAA pursuant to the Federal Tort Claims Act, although he did not indicate the procedure for distributing mail once it is received by the FAA. Nevertheless, one must conclude that even if Mr.

Fischer's claim might have been received at the agency office prior to the date it actually was brought to Mr. Harrison's attention, it could not possibly have been there before October 31, 1972, three days after the limitations period expired. That conclusion follows necessarily from Mr. Byrd's statement that the claim did not leave the post office until 2:25 A.M., October 31, 1972.

Moreover, Mr. Byrd's testimony moots plaintiff's argument that the government unilaterally shortened the limitations period by closing its offices on Saturday and Sunday, October 28 and 29, 1972. Even if this were a viable issue, plaintiff would still have missed the limitations period by failing to present his claim to the FAA on Monday, October 30, the first work day after the October 28 deadline.

Since the administrative claim was not presented to the FAA until October 31, 1972, Mr. Fischer's claim is barred by the statute of limitations. Accordingly, his case versus the government is dismissed.

An appropriate order shall be submitted.

/s/ RALPH M. FREEMAN
United States District Judge

Dated: July 8, 1976
Detroit, Michigan

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed February 3, 1977)

(John W. Hoffman, Anton Verbiscus, William R. Fischer, Joe Tibus, Duane Braun, George Carlton and Arthur Novotney, Plaintiffs, vs. United States of America, Defendant. No. 40141)

This action arises out of an airplane crash which occurred on October 28, 1970, when Beech D18S, Registration No. N8999E, crashed shortly after takeoff from Mettetal Airport, Plymouth, Michigan. Since extensive stipulations have been entered by the parties in this case, the Court finds it appropriate to adopt those findings as set forth in the original and supplemental pretrial orders. Those stipulations of fact are adopted by reference and may be summarized as follows:

The aircraft involved in this action was owned by American Aviation Company and piloted by John J. Murphy. At the time of takeoff and during the crash, the airplane was at least 279 pounds over the maximum allowable gross weight prescribed by the manufacturer, and the center of gravity was over five inches aft of the permissible limits prescribed by the manufacturer, and at least thirty pounds over the maximum allowable gross weight at the farthest aft station. The five fuel tanks on the aircraft were empty or so close to empty that fuel exhaustion occurred almost immediately, which, when aggravated by the excess weight and improper balance, resulted in the low-altitude crash.

The FAA issued an ATCO Certificate to American Aviation on July 15, 1969, at which time pilot Murphy was aware of the passenger liability insurance requirement of $75,000 per passenger. At that time, the policy of the FAA was to instruct FAA inspectors that insurance requirements were the responsibility of the CAB, and that they should not attempt to withhold ATCO certificates until the applicant obtained insurance. Although Murphy thought he had the requisite liability insurance when he applied for his certificate, he was in fact not insured at the time of the accident. The parties to this action have agreed that pilot Murphy, whose responsibility it was to properly load and fuel the aircraft, was grossly negligent in failing to make the necessary flight preparations.

This case is brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346 *et seq.* The Government is correct in arguing that in order to recover under that statute, plaintiffs have the burden of showing that they would be entitled to recover under the law of Michigan if the United States were a private individual. The statute itself provides that the Government shall be liable for tortious conduct committed by its employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). In *Richards v. United States*, 369 U.S. 1 (1969), the Supreme Court held that the statute requires application of the whole law of the state where the act or omission occurred. Since no conflict of law questions are at issue here, the law of Michigan clearly applies.

Under Michigan law, the elements of a cause of action in negligence are: (1) that the defendant owed a legal duty to the plaintiff; (2) that the defendant breached or violated the legal duty; (3) that the plaintiff suffered damages; and (4) that the breach of the duty was a proximate cause of the damages suffered. *Roulo v. Automobile Club of Michigan* 386 Mich. 324 (1971). Even assuming that the FAA was negligent in issuing an ATCO certificate without ascertaining that the company had the economic authority required by the CAB (that is, liability insurance of $75,000 per passenger), plaintiff still must establish that the improper licensing was a proximate cause of their damage.[1]

While no Michigan case has addressed the issue, at least three federal courts have held in aviation certification cases that the issuance of an FAA certificate is not causally connected to a later crash. In *Bristow v. United States*, 309 F. 2d 465 (6th Cir. 1962), the Sixth Circuit held that even if the Government could have been held liable for negligence in issuing a CAB airworthiness certificate, plaintiffs could not recover where it was clear that the accident was directly caused by pilot error and not by the condition of the airplane. In *Gibbs v. United States*, 251 F. Supp. 391 (E.D. Tenn. 1965), the Court again considered the issues of negligence and proximate cause. In that case, the Court

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[1] Michigan law clearly establishes that an unlicensed motorist is not precluded from maintaining a cause of action by reason of his failure to be properly licensed, *Jones v. Brookfield Township*, 221 Mich. 235 (1922), although no Michigan case has addressed the issue of whether improper licensing may constitute negligence sufficient to give rise to a cause of action against a licensing official. Even assuming that Michigan might recognize such a cause of action, however, one is still left to resolve the underlying factual issue of whether the negligent issuance of the certificate or license was a proximate cause of the crash.

held that even though the Government was negligent in failing to follow proper inspection procedures, the United States was not liable where the proximate cause of the crash was pilot error. The Court stated:

> Having decided to enter the broad field of the regulation of the flight and repair and modifications of aircraft licensing of pilots, the Government becomes responsible for the care with which those activities are conducted. It may no longer take refuge behind the distinction between proprietary and governmental functions. But, the Government nevertheless does not become an insurer. Its liability is subject to the same requirements of negligence and causation as would affect the liability of a private person in the same circumstances.
>
> . . . .
>
> As to the certification of the carrier and the airworthiness of aircraft N2999 as mofidied, the Court cannot say that it discharged its duty of care in either instance. It would seem to the Court that there was not proper coordination between the Charlotte and Florida offices of the FAA. And the Court is equally impressed that there was laxity in the manner in which the authorized inspector returned N2999 to service after its modification without checking the S.T.C. under which the modification was purported to have been made.
>
> The difficulty the Court has is that, even though there appears to have been culpable negligence in these matters, it cannot find that

> either laxity caused the accident. Although there was conflicting testimony, the Court finds that the craft involved in the crash was airworthy and that there was data available to the pilot from which he could have determined its center of gravity.
>
> It does not consider that the laxities of which it has taken note were the proximate cause alone or in combination of the crash. The Court is of the opinion and finds that the error of the pilot in overloading the craft and positioning its load so that its center of gravity was moved rearwardly beyond the safety point was the proximate cause of this tragic crash . . . .
>
> The proof fails to show any negligence upon the part of an agent, servant or employee of the Government while in the performance of his duties that was the proximate cause of the airplane crash . . . . (251 F. Supp. at 400-01)

A result similar to that in *Bristow* and *Gibbs* was reached in *Harvey v. United States*, Civil No. 73-1869 (E.D. Pa., March 19, 1976).

This Court is convinced that the FAA's failure to demand proper insurance coverage before issuing an ATCO certificate in the instant case was in no way connnected to the cause of the later crash. Factually this case is even further removed from the causation question than the cases discussed above, since there was no failure to inspect for airworthiness but merely a failure to demand insurance coverage. This Court finds that the sole proximate cause of this accident was pilot

negligence and therefore declines to consider the complex legal issues involving the Federal Tort Claims Act raised by defendant. The Court finds no cause for action against the United States in the instant case.

An appropriate order shall be entered in accordance with this opinion.

/s/ RALPH M. FREEMAN
United States District Judge

Dated: Detroit, Michigan
February 2, 1977

TO: Charles Cheatham, Esq.
2450 Buhl Building
Detroit, Michigan 48226

Michael Wicks, Esq.
Assistant U.S. Attorney
Federal Building
Detroit, Michigan 48226

Jonathan M. Hoffman, Esq.
Torts Section, Civil Division
Department of Justice
Washington, D.C. 20530

ORDER DISMISSING CROSS APPEAL

(United States Court of Appeals
For the Sixth Circuit)

(Filed November 10, 1977)

(John W. Hoffman, Anton Verbiscus, William R. Fischer, Joe Tibus, Duane Brown, George Carlton and Arthur Novotney, Plaintiffs-Appellants, Cross-Appellees, vs. United States of America, Defendant-Appellee, Cross-Appellant. No. 77-1291)

Upon consideration of the motion of the cross-appellant for a voluntary dismissal of the cross appeal,

It is ORDERED that the motion be granted and the cross appeal be and it hereby is dismissed.

ENTERED PURSUANT TO SIXTH CIRCUIT RULE 4(f).

/s/ JOHN P. HEHMAN
Clerk

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed December 20, 1977)

(John W. Hoffman, Anton Verbiscus, William R. Fischer, Joe Tibus, Duane Braun, George Carlton and Arthur Novotney, Plaintiffs-Appellants vs. United States of America, Defendant-Appellee. No. 77-1290)

BEFORE: CELEBREZZE, PECK and LIVELY, Circuit Judges

Upon consideration of defendant-appellee's motion to dismiss the appeal of plaintiff-appellant William R. Fischer,

IT IS ORDERED that the motion be and it is hereby referred to the hearing panel.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

DECISION

(United States Court of Appeals
For the Sixth Circuit)

(Decided and Filed June 26, 1979)

(John W. Hoffman, Anton Verbiscus, William R. Fischer, Joe Tibus, Duane Braun, George Carlton and Arthur Novotney, Plaintiffs-Appellants, v United States of America, Defendant-Appellee. No. 77-1290)

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Before: EDWARDS, Chief Judge, WEICK, Circuit Judge, and CECIL, Senior Circuit Judge.

PER CURIAM. Plaintiffs brought suit in the United States District Court for the Eastern District of Michigan, Southern Division, under the Federal Tort Claims Act, 28 USC §§ 1346(b) and 2671, *et seq.* (1976), alleging that the United States, through its agents, the Federal Aviation Authority and the Civil Aeronautics Board, negligently issued a license to American Aviation Company and that the negligent issuance of that license without requiring American Aviation to show that it carried insurance for its passengers was the proximate cause of loss to plaintiffs.

The facts in this case were based principally upon stipulations. These stipulations showed without dispute that plaintiffs' complaints originated in the crash of an aircraft on October 28, 1970; that the aircraft was operated by American Aviation, and that the crash was due to the gross negligence of the pilot in failing to

check his gasoline supply and in overloading the plane prior to take-off. Subsequent to the crash it was ascertained that neither American Aviation nor the pilot had insurance which covered the injuries to those who had been injured and damaged by the crash.

After the filing of stipulations and trial of this case, the District Court in the Eastern District of Michigan dismissed plaintiffs' complaint on the ground that the injuries complained of were not proximately caused by the defendant.

Prior to trial the District Judge had heard and denied without prejudice a government motion to dismiss the complaint on the grounds of the exemption in the Federal Tort Claims Act set forth in 28 USC § 2680(a) and (h) (1976), which would except from liability claims based on discretionary acts or misrepresentation. The government's motion to dismiss had been renewed at the time of trial.

We recognize fully that plaintiffs assert that the "injuries" which they sue for are the monetary losses resulting to them from the government's failure to require American Aviation to carry insurance. However, on the fact pattern involved in this case, we cannot avoid the conclusion of the District Court set forth below. After citing *Bristow* v *United States*, 309 F2d 465 (6th Cir 1962); *Gibbs* v *United States*, 251 F Supp 391 (ED Tenn 1965), and *Harvey* v *United States*, 14 Av Cases 18,048 (ED Pa 1976), the District Judge concluded:

> This Court is convinced that the FAA's failure to demand proper insurance coverage before issuing an ATCO certificate in the instant case was in no way connected to the cause of the later crash. Factually this case is even further removed from the causation question than the cases discussed above, since there was no failure to inspect for airworthiness but merely a failure to demand insurance coverage. This Court finds that the sole proximate cause of this accident was pilot negligence and therefore declines to consider the complex legal issues involving the Federal Tort Claims Act raised by defendant. The Court finds no cause for action against the United States in the instant case.

We observe that if we were to reach the "complex litigation issues involving the Federal Tort Claims Act" referred to above, we would be forced to find that 28 USC § 2680(a) and (h) (1976) constitute exceptions from federal liability under the Tort Claims Act which also serve to bar plaintiffs' cause of action in this case. See *Dalehite* v *United States*, 346 US 15, 41 (1953).

The judgment of the District Court is affirmed.

DEPARTMENT OF TRANSPORTATION—FEDERAL AVIATION ADMINISTRATION

APPLICATION FOR AIR TAXI / COMMERCIAL OPERATOR (ATCO) CERTIFICATE UNDER FAR 135

Approved: Budget Bureau No. 04-R0171

Submit in triplicate (3) to appropriate FAA District Office.

1. APPLICATION IS HEREBY MADE FOR ("X" applicable box)
[X] ISSUANCE [ ] AMENDMENT OF ATCO CERTIFICATE

2. NAME AND ADDRESS OF APPLICANT
John J. Murphy and
Lesley E. Krajenke d/b/a
American Aviation Company
Oakland-Pontiac Municipal Airport
Pontiac, Michigan ZIP CODE: 48054

2a. OPERATING AS
[ ] INDIVIDUAL [X] PARTNERSHIP [ ] CORPORATION
[ ] OTHER (Specify):

	YES	NO
2b. U.S. CITIZENSHIP AS DEFINED IN FAR 135	X	
2c. HOLD CAB ECONOMIC/EXEMPTION AUTHORITY		X
2d. HOLD A COMMERCIAL OPERATING CERTIFICATE (If "Yes," state Regulation(s) under which issued):		X

3. PRINCIPAL OPERATIONS BASE (Airport, City, State)
Pontiac Airport-Pontiac, Michigan 48054

4. PRINCIPAL MAINTENANCE BASE (Airport, City, State)
Pontiac Airport-Pontiac, Michigan 48054

5. NAME OF [X] OPERATIONS MANAGER OR [X] CHIEF PILOT
John J. Murphy
PHONE (Incl. area code): 313 673-1700

6. NAME OF [X] MAINTENANCE SUPERVISOR OR [X] CHIEF MECHANIC
Harvey Bliszack
PHONE (Incl. area code): 313 673-1700

7. OPERATION AUTHORIZATIONS REQUESTED ("X" applicable items)

AIRCRAFT CATEGORY AND CLASS	CARRYING		VFR		IFR		
	PASS.	CARGO	DAY	NIGHT	DAY	NIGHT	OFF AIRWAYS
AIRPLANE—SINGLE ENGINE LAND	X	X	X				
AIRPLANE—MULTI ENGINE LAND	X	X	X	X	X	X	
AIRPLANE—SINGLE ENGINE SEA							
AIRPLANE—MULTI ENGINE SEA							
HELICOPTER							
OTHER (Specify)							

8. AREA OF OPERATION
[X] UNITED STATES
[ ] SPECIFIC AREAS
[X] INTERNATIONAL (List Countries)
Canada

9. AIRCRAFT TO BE USED (List one aircraft only in each category and class)

REGISTRATION NUMBER	MAKE	MODEL	CATEGORY AND CLASS	OWNERSHIP ("X" one)		EQUIPPED FOR ("X" applicable items)			
				OWNED	AGREEMENT OR LEASE (Attach copy)	VFR		IFR	
						DAY	NIGHT	DAY	NIGHT
N22576	Cessna	150	SEL		X	X			
N4130T	Cessna	320	MEL		X	X	X	X	X

10. CERTIFICATION
I certify these statements and the attachments hereto are true and correct.
SIGNATURE OF APPLICANT: John J. Murphy
TITLE: Partner
DATE: July 11, 1969

RECORD OF ACTION—FOR FAA USE ONLY

11. INSPECTOR'S RECOMMENDATIONS

OPERATIONS AUTHORIZED:
Airplane Single Engine Land: VFR, Day, Passengers and Cargo
Airplane Multi Engine Land: VFR, IFR, Day and Night, Passengers and Cargo

AREA OF OPERATIONS:
Continental United States including Alaska and the country of Canada.

AUTOPILOT AUTHORIZATIONS AND LIMITATIONS:
See Operations Specifications.

12. INSPECTORS' SIGNATURES	OPERATIONS	MAINTENANCE	AVIONICS
	V. J. Scarpenza	Robert E Burk	Ronald L. B. Lyon

13. APPROVAL ACTION

COMMENTS

[ ] APPROVED. CERTIFICATE NO. ISSUED:

[ ] DISAPPROVED — SIGNATURE: David W. Kuen — TITLE — DATE

FAA Form 8000-6 (1-68)

Deposition Exh # i (Murphy)
6-1-76 L.M

I-55

DATE July 11, 1969

FROM: American Aviation Company

TO: Federal Aviation Administration

I-56

We will obtain diplomatic clearance prior to departure, directly, or through U.S. Department channels before operating into the following listed countries: (List Specific Countries)

Canada

We plan on carrying [X] Cargo, [X] Passengers, and will operate under [X] VFR, [X] Day, [X] Night, [X] IFR Conditions.

IF APPLICABLE: List Specific

If maintenance is required while operating in the above foreign country, we will make every effort to obtain this service from a certificated mechanic and/or a certificated repair station, certificated by that country.

My reason(s) for desiring foreign air taxi operations is as follows:

Passenger Carrying and Airfreight

John D. Murphy, Jr. pres.
Signature & Title

NOTICE

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

N 8430-120
2/9/70
Cancellation
Date: 9/1/70

SUBJ: FAA ENCORCEMENT RESPONSIBILITY OF THE CAB PART 298 REQUIREMENTS

1. *PURPOSE.* This Notice provides guidance with respect to the FAA responsibility for enforcement of the liability insurance, registration and reporting requirements imposed on air taxi operators by the 1 July 1969 amendment and reissuance of the Civil Aeronautics Board Economic Regulations Part 298.

2. *BACKGROUND.* Referring to FAR 135.15(b), field personnel have been asking the following questions —

   a. Should an FAA ATCO certificate be denied an applicant unless he presents evidence of having complied with:

      (1) the registration requirements, and,

      (2) the liability insurance requirements of Part 298?

   b. Should enforcement action be initiated against those operators currently certificated and operating who have not complied with the insurance, registration and reporting requirements of Part 298?

3. *EXPLANATION.*

   a. Section 298.50 of Part 298 requires every air taxi operator who is operating in air transportation as of 1 July 1969 to register with the CAB on or before that date and annually thereafter. Persons who commence operations under Part 298 after 1 July 1969 are granted a 30-day period, within which to register and shall register annually thereafter.

   b. An FAA ATCO certificate authorizes operations as a commercial operator as well as an air taxi operator. Since operations conducted by a commercial operator do not require any economic authority from the CAB, section 135.15(b) of the Federal Aviation Regulations would not be applicable to those operations.

   c. Under the provisions of section 298.21(g) of Part 298, an air taxi operator is prohibited from providing air transportation, or holding out to the public expressly or by course of conduct, that it provides any air transportation for which there is not in effect liability insurance which complies with the requirements of Subpart D of that Part and which covers such transportation. Violations of this provision are the primary responsibility of the CAB and may subject the violator to a civil penalty of $1,000 for each day of such violation.

4. *ACTION.*

   a. Inspectors will advise applicants for an ATCO certificate of the insurance requirements of the

CAB, but should not attempt to withhold the issuance of an ATCO certificate until the applicant obtains the required insurance certificate.

   b. As in the case of other economic violations detected by FAA personnel, inspectors should report any violation of the insurance, registration or reporting requirements to the Regional Counsel who in turn will notify the CAB. It is then the responsibility of the CAB to conduct such investigations and take such corrective action as they deem appropriate.

   c. Handbook 8030.7 will be revised to reflect this procedure.

/R.S. Sliff
Acting Director,
Flight Standards Service

Distribution: FFS-1, 2, 3 and 5 (all employees)
FIA-O (std.)
8430

Initiated by: FS-448

8430.1A
11/3/70

CHAPTER 3. CERTIFICATION OF AIR TAXI OPERATORS AND COMMERCIAL OPERATORS OF SMALL AIRCRAFT

51. *ELIGIBILITY FOR CERTIFICATE (FAR 135.15).*

a. An ATCO operating certificate issued under the rules of Part 135 of the Federal Aviation Regulations is applicable to both air taxi operations and commercial operations of small aircraft.

b. The holder of an ATCO certificate is prohibited from engaging in air transportation except through exemption authority provided by Civil Aeronautics Board Economic Regulation Part 298. Although enforcement of this regulation is the primary responsibility of the CAB, inspectors shall advise applicants for an ATCO certificate of the liability insurance, registration and reporting requirements of Part 298. Do not withhold the issuance of an ATCO certificate because the applicant does not have the required insurance certificate.

c. Any violation of the insurance, registration or reporting requirements detected by FAA personnel should be brought to the attention of the Regional Counsel through channels who in turn will notify the CAB. It is then the responsibility of the CAB to conduct such investigations and take such corrective action as they deem appropriate.

52. *APPLICATION FOR ATCO CERTIFICATE UNDER FAR 135.*

a. Application for Air Taxi Commercial Operator Certificate under FAR 135, (BOB 04-RO171), FAA Form 8000-6, is submitted in triplicate by the applicant. An application for an operating certificate or amendment to an existing certificate is made by the applicant completing Items 1 through 10 (Figure 3-1). The inspector shall make no additions, deletions, or corrections to the application as presented. If an item is in error, the individual or his representative submitting the application must make the correction and initial the change.

b. To avoid any legal difficulties from the standpoint of enforcement of the FARs, it is essential that the true name and correct address of the applicant be used on the application (FAA Form 8000-6) and on the Air Taxi/Commercial Operator Certificate (FAA Form 8430-2). Also, correct completion of Items 2a on the application is important. (Figures 3-2 and 3-3)

c. Only one ATCO certificate will be issued to any person. (Definition of person in FAR Part 1.) However, an organization may operate under more than one business name on a single certificate. (Figure 3-2)